IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1768

FRED C. TALLANT, SR. and
WILLIAM M. WOMACK, JR.,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners respectfully pray that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit on March 7, 1977, entitled *United States of America v. Fred C. Tallant, Sr. and William M. Womack, Jr.*, 541 F2d 1291.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 541 F2d 1291 and is printed as Appendix A herein.

JURISDICTION

This petition seeks review of the judgment of the United States Court of Appeals for the Fifth Circuit dated March 7, 1977. There has been no order in regard to rehearing, nor extension of time for the filing of this petition. Review by certiorari is sought pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit violated petitioners' constitutional rights by refusing to review on appeal eleven defects alleged as to the indictment and proceedings in the district court by classifying said defects as "nonjurisdictional" and holding that such nonjurisdictional defects cannot be considered on appeal.

CONSTITUTIONAL PROVISION INVOLVED

This case involves only the due process provisions of the Fifth Amendment to the Federal Constitution.

STATEMENT OF THE CASE

Petitioners are principal officers and directors and controlling persons of Preferred Land Corporation, a publicly owned Georgia corporation with approximately 5,000 Georgia shareholders, who purchased their securities in a series of *intrastate* offerings of said securities by Preferred Land Corporation during the years 1967 to 1970. All of the offerings were registered with and made pursuant to the local Blue Sky laws of the State of Georgia, which also approved the prospectuses used and the terms and conditions of the offering including the disclosures made in the prospectuses. As intrastate offerings, the securities were exempt from the registration requirements and other provisions of the Securities Act of 1933 (15 U.S.C. 77c(11)).

The corporation is now and has always been a going concern, and no shareholder has ever involuntarily incurred one cent of loss by reason of his investment.

In April, 1974 the Securities and Exchange Commission forwarded directly to the United States Attorney in Atlanta, Georgia, an investigative file concerning Preferred Land Corporation, in violation of the statutory requirements that said file be forwarded only to the Attorney General of the United States for an exercise of his discretion as to whether to institute criminal proceedings. (Sec. 20, 1933 Act, 15 U.S.C. 77v). On November 21, 1975, petitioner Tallant pleaded *nolo contendere* to counts 1 through 11 of a multiple count indictment and was committed to the custody of the Attorney General for imprisonment for a period of three years with probation for five years, and a fine of $40,000. On the same day petitioner Womack pleaded *nolo contendere* to counts 1 through 12 of the indictment and was similarly committed and sentenced, with a fine of $15,000.

On appeal to the United States Court of Appeals for the Fifth Circuit, petitioners presented 15 issues for review. The Fifth Circuit reduced those 15 to what it termed "11 errors" which are cited in footnote 4 of that court's opinion contained herein at Appendix A. As set forth in the opinion of the Fifth Circuit, that court classified certain of the alleged errors as being "nonjurisdictional" and refused to consider on appeal 9 of the 11 defects for which petitioners requested review on grounds that they were nonjurisdictional as so classified by the Fifth Circuit. The entire 15 alleged errors are set forth more particularly under "Reasons for Granting the Writ" hereinafter.

REASONS FOR GRANTING THE WRIT

The court of appeals for the Fifth Circuit has rendered a decision in this case in conflict with the decisions in the First, Second, Eighth and Ninth Circuits in holding that only jurisdictional defects in the proceedings below will be considered by the United States Court of Appeals for the Fifth Circuit on appeal from proceedings in which a sentence is founded on a *nolo contendere* plea. Further, the Court of Appeals for the Fifth Circuit in this case has decided a federal question in a way in conflict with applicable decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the district court, as to call for an exercise of this Court's power of supervision, all as set forth hereinbelow.

The above referred to questions arise by reason of the misconception of the law contained in the opinion of the United States Court of Appeals for the Fifth Circuit in this case (*United States v. Tallant*, 541 F.2d 1291), wherein the court of appeals states:

> "The initial consideration before this court on any appeal from a conviction founded on a *nolo contendere* plea is what form of error is appealable. Prior decisions clearly indicate that only jurisdictional defects in the proceedings below may be considered by this court on appeal."

In *Lott v. United States*, 367 U.S. 424, 428, 81 S.Ct. 1563 (1961), this Court stated with respect to a plea of *nolo contendere*, ". . . The plea itself does not constitute a conviction nor hence a 'determination of guilt'." Thus

the court below proceeded upon a wrong view of the law in treating the appeal as an appeal "from a conviction founded on a *nolo contendere* plea", and should be reviewed by this Court for that reason alone.

This Court has made the distinction between pleas of *nolo contendere* and guilty clear in *North Carolina v. Alvord*, 400 U.S. 34, 91 S.Ct. 160 (1970), where it said in footnote 8 to its opinion:

> "Throughout its history, that is, the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency. Fed.Rule Crim. Proc. 11 preserves this distinction in its requirement that a court cannot accept a guilty plea 'unless it is satisfied that there is a factual basis for the plea'; there is no similar requirement for pleas of *nolo contendere*, since it was thought desirable to permit defendants to plead *nolo* without making any inquiry into their actual guilt. See notes of Advisory Committee to Rule 11."

Thus, while it may be true that a plea of *nolo contendere* is an admission of guilt for purposes of the case (*Hudson v. United States*, 272 U.S. 451, 455), and that nothing is left but to render judgment for the reason that in the fact of a *nolo* plea no issue of fact exists (*United States v. Norris*, 281 U.S. 619, 623), it is also clear that a plea of *nolo contendere* is *not* a conviction and is not a plea of guilty, which would have the effect of "admitting all material facts alleged in the charge". (*United States v. Cox*, 464 F.2d 937 (CA 6, 1972)).

This Court has never ruled that only jurisdictional defects in proceedings in a federal district court may be considered on appeal.[1] While it is true that the Fifth Circuit has so decided in this case and other cases (*United States v. Winter*, 509 F.2d 975, 978 n. 8; *United States v. Chaiken*, 489 F.2d 1052; *United States v. Mizell*, 488 F.2d 97), it is also true that other circuits have taken a different view or at least a less stringent view and allow appeals on nonjurisdictional issues under certain circumstances. In *United States v. Decosta*, 435 F.2d 630, the First Circuit reviewed a speedy trial question following a guilty plea, passing upon the evidentiary matters involved. The Second Circuit has allowed review of a motion to dimsiss an indictment following an admission of guilt where the asserted grounds for dismissal were that appellant's right to a fair trial were compromised by adverse publicity. *United States v. Grassia*, 354 F.2d 27. The Second Circuit has also considered on appeal the legality of a search following a guilty plea. *United States ex rel Rogers v. Warden*, 381 F.2d 209. Other Second Circuit cases indicate that nonjurisdictional issues may be preserved on appeal if specifically reserved. See *United States v. Doyle*, 348 F.2d 715; *United States v. Mann*, 451 F2d 346. The Eighth Circuit allowed an appeal from denial below of a motion to dismiss the indictment following a *nolo contendere* plea where the question was whether the offense was barred by the statute of limitations. *Jaben v. United States*, 333 F.2d 535, aff'd, 381 U.S. 214. The Ninth Circuit has reviewed evidentiary issues following admissions of guilt by permitting attacks on the voluntariness of the

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[1] See *Jaben v. U.S.*, 381 U.S. 214, where this Court affirmed an Eighth Circuit decision allowing an appeal from denial of a motion to dismiss following a *nolo contendere* plea.

plea where it was alleged that the plea was induced by a deprivation of fundamental constitutional rights. *Doran v. Wilson*, 369 F.2d 505; *Briley v. Wilson*, 376 F.2d 802. The Fifth Circuit itself has reviewed nonjurisdictional matters in certain types of appeals. See *United States v. Rosenberg*, 458 F.2d 1183; *United States v. Cook*, 463 F.2d 123; *United States v. Wysocki*, 457 F.2d 1155.

That the denial of review on appeal from a federal district court of nonjurisdictional or evidentiary questions is and should be a Fifth Amendment due process right can reasonably be based on the presumption that a guilty person would plead guilty, or go to trial and be convicted, and that the defendant resorts to a *nolo contendere* plea only in circumstances where he entertains doubts as to his guilt but is willing to be punished as if guilty to avoid other collateral consequences of the publicity and expense and other factors involved in a criminal trial.

Such an assumption can be based on the general pattern of human conduct. Defendants would not resort to a *nolo contendere* plea in the face of guilt, and would simply plead guilty if they were confronted with a clear cut case of overwhelming evidence of wrong doing or violative conduct. There can be no reasonable or fair reason to deny review on appeal of nonjurisdictional or evidentiary questions in proper cases. The trial court is in a position either to accept a guilty plea or proceed with the trial. The trial court itself must have some doubts, any of which must be resolved in favor of the defendant, if it accepts a *nolo contendere* plea. If this is not so, then this Court should once and for all rule that there is no such thing as a *nolo contendere* plea, and that a person is either guilty or not guilty, depending upon his voluntary plea or conviction after trial.

As set forth in the Statement of Facts hereinabove, appellants presented for review in the court below 15 different questions, raising significant and substantial questions going to the very heart of due process, as follows:

1. Was the court below justified in denying defendants' motion to dismiss the indictment on grounds that the grand jury returning the indictment was not selected at random from a fair cross section of the community in the division wherein the trial court was convened?

2. Was it error for the trial court to deny defendants' motion to dismiss the indictment on grounds that one of the grand jurors was disqualified from jury service by reason of being a convicted felon?

3. Was the trial court wrong in denying defendants' motion to inspect the grand jury minutes to determine whether pre-indictment publicity so prejudiced the grand jury as to deprive them of due process and to determine whether the prosecutor's domination of the grand jury was so prejudicial to appellants as to deny them due process?

4. Was the trial court in error in denying appellants' motion to dismiss the indictment on grounds of prejudicial pre-indictment publicity?[2]

5. Was the indictment returned by the grand jury so inherently prejudicial by reason of misjoinder of parties and offenses that it was a denial of due process?

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[2] *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639, "England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury."

6. Was the trial court in error in denying defendants' motion to dismiss the indictment on grounds that it did not charge an offense within federal criminal jurisdiction under Section 17 of the Securities Act of 1933?

7. Was the district court in error in denying defendants' motion to dismiss the indictment as improperly obtained by the United States Attorney in the absence of an exercise of discretion by the Attorney General of the United States under Section 20 of the Securities Act of 1933?

8. Is Section 17 of the Securities Act of 1933 unconstitutional as applied in the indictment in this case?

9. Is the federal mail fraud statute unconstitutional as applied in the indictment in this case?

10. Is the Federal conspiracy statute unconstitutional as applied in the indictment herein?

11. Is the federal obstruction of proceedings statute unconstitutional as applied in the indictment in this case?

12. Do the acts charged in the indictment constitute a criminal offense within the jurisdiction of the federal courts?

13. Did the trial court err in refusing to dismiss the indictment because the acts charged as being federal offenses occurred more than five years prior to the time the indictment was returned?

14. Did the trial court abuse its discretion and impose excessive fines and sentences because it misunderstood and misapplied the law and disregarded the lack of materiality in the alleged nondisclosure of information on which the indictment was based?

15. Did the United States Attorney abuse his discretion and procure the indictment of defendants by reason of

misunderstanding and misguiding the grand jury as to the laws alleged to have been violated?

Each of these questions raises substantial due process problems, and involve the constitutional rights of petitioners herein. Nonetheless, the Fifth Circuit Court of Appeals absolutely disregarded questions 1, 2, 3, 4, 5, 6, 8, 10 and 11 as set forth above as being "nonjurisdictional".

By making such a classification of petitioners' contentions, the court of appeals has denied them the due process right to have an Article III court review all substantial questions which may have resulted in the deprivation of the liberty of petitioners in contravention of constitutional rights.

CONCLUSION

Because of the uncertainty as to the true significance or status of a *nolo contendere* plea in terms of review on appeal, and because of the conflicting views among the various Circuits, as well as the uncertainty generated by this Court's decision in the *Lott*, *Alvord* and *Jaben* cases, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Carl L. Shipley
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Counsel for Petitioners

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Fred C. TALLANT, Sr., and William M. Womack, Jr.,
Defendants-Appellants.

No. 75-4244.

United States Court of Appeals,
Fifth Circuit.

March 7, 1977.

Following pleas of nolo contendere the United States District Court for the Northern District of Georgia, at Atlanta, Richard C. Freeman, J., entered judgments convicting defendants of violations of general antifraud provisions of Securities Act of 1933, the federal mail fraud statute, the federal conspiracy statute and, with respect to one defendant, conviction for obstruction of the proper administration of the Securities Act of 1933, and the defendants appealed. Pending appeal, the District Court, 407 F. Supp. 896, denied motion for reduction of sentence and for a stay pending appeal. The Court of Appeals, Brown, Chief Judge, held, inter alia, that the Securities Act of 1933 was constitutional, that in view of nolo contendere pleas the nonjurisdictional alleged defects could not be considered on appeal, and that indictment adequately charged offenses within jurisdiction of federal court in violation of antifraud provision of Securities Act of 1933, the federal mail fraud statute, federal obstruction of justice statute and the federal conspiracy statute.

Affirmed.

* * *

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, and HILL and FAY, Circuit Judges.

JOHN R. BROWN, Chief Judge:

In connection with the intrastate offering and sale of securities of the Preferred Land Corporation, Fred C. Tallant, Sr. and William Womack, Jr., as officers, directors, and control persons, were indicted for violation of the general antifraud section of the Securities Act of 1933, 15 U.S.C.A. § 77q(a), the federal mail fraud statute, 18 U.S.C.A. § 1341, and of the federal conspiracy statute, 18 U.S.C. § 371. Because of falsification and presentation of such records to the Securities and Exchange Commission (S.E.C.) for examination in violation of 18 U.S.C.A. § 1505,[1] appellant Womack was indicted individually for obstruction of the proper administration of the Securities Act of 1933.

After repeated pre-trial attacks,[2] both Tallant and Womack pleaded, just prior to trial, *nolo contendere* to all

[1] Counts 1 to 5 covered the general fraud violations of 15 U.S.C. §77q(a), counts 6 to 10 set forth the mail fraud violations, count 11 sets forth the conspiracy violation, and count 12 presents the obstruction allegation.

[2] The extensive and forceful nature of these skirmishes is revealed by the following history of this case which has been much litigated in this and other courts. Tallant and Womack have previously sought a determination that the indictment was improperly obtained. In December 1974 this Court in *Preferred Land Corporation v. Stokes*, 5 Cir., 1974, 505 F.2d 733, affirmed the District Court's denial of injunctive relief seeking to prevent the United States attorney from obtaining the indictment.

(cont'd)

counts of the indictment.[3] On appeal from the conviction on a plea of *nolo*, eleven errors are set forth.[4] Of those items of error properly before this Court, we find them to be without merit and affirm the convictions. Many of the errors are not reachable from a *nolo* conviction.

2 (cont'd)

On April 22, 1974, before the appeal to the Fifth Circuit of the District Court's denial of injunctive relief, the defendants and Preferred Land Corporation filed a petition for a writ of mandamus against the District Court judge alleging the United States attorney improperly obtained the indictment. *Preferred Land Corp., et al. v. Hon Charles A. Moye, Jr.*, 5 Cir., No. 74-2030. This Court denied the petition on May 3, 1974. This same issue was presented to the Supreme Court in a motion to file a petition for a writ of prohibition or mandamus. The motion for leave to file the petition was denied. *Tallant and Womack v. Charles A. Moye, Jr.*, 1974, 419 U.S. 821, 95 S.Ct. 156, 42 L.Ed.2d 128.

Other litigation related to this case includes *Preferred Land Corporation*, D.D.C., 1974, No. 74-69; *Preferred Land Corporation, et al. v. Securities and Exchange Commission*, D.D.C., 1974, No. 74-559, aff'd., D.C.Cir., 1975, 511 F.2d 448; *Preferred Land Corporation v. Johr H. Pratt, etc.*, D.C.Cir., 1974, No. 74-1484.

[3] For Tallant, the *nolo contendere* plea covered counts 1 through 11 and for Womack counts 1 through 12.

[4] In their brief, the eleven errors cited are outlined as follows:

1. Whether the grand jury returning the indictment was randomly selected from a fair cross section of the community.
2. Whether the indictment should have been dismissed because one of the grand jurors was disqualified as a convicted felon.
3. Whether the trial court properly refused to permit appellants to inspect the grand jury minutes to determine whether that body was prejudiced by pre-indictment publicity causing a denial of due process.

(cont'd)

Non-Jurisdictional, Non-Appealable

[1] The initial consideration before this Court on any appeal from a conviction founded on a *nolo contendere*

4 (cont'd)

4. Whether the District Court properly refused to grant appellants permission to inspect grand jury minutes to determine whether the United States Attorney substituted his judgment for that of the grand jury causing a denial of due process.
5. Whether the District Court should have dismissed the indictment on grounds of prejudicial pre-indictment publicity.
6. Whether the indictment was invalid because inherently prejudicial by reason of misjoinder of parties and offenses.
7. Whether the indictment charges acts which are offenses within the criminal jurisdiction of the federal courts.
   A. Under § 17 of the Securities Act of 1933 (15 U.S.C.A. § 77(q)(a)).
   B. The indictment does not charge an independent mail fraud offense.
   C. The indictment does not charge acts constituting an offense under 15 [18]U.S.C.A. § 1505 (obstruction of justice).
   D. The indictment does not charge an offense under 18 U.S.C.A. § 371 (conspiracy).
8. Whether the United States Attorney abused his discretion by procuring the indictment on the basis of the grand jury's misunderstanding of the law.
9. Whether Section 17 of the 1933 Act is constitutional.
10. Whether the district court incorrectly imposed fines or penalties on appellants.
11. Whether the indictment was unauthorized by the United States Attorney General and obtained in violation of Section 20 of the Securities Act of 1933.

One other error, a jurisdictional one listed as an "issue presented" but not subsequently briefed in Appellants' brief or orally argued, is the expiration of the statute of limitations. This fails as the indictment on its face clearly alleges acts occurring within the five-year statute of limitations imposed by 18 U.S.C.A. § 3282. See *United States v. Ashdown*, 5 Cir., 1975, 509 F.2d 793, 797-98.

plea is what form of error is appealable. Prior decisions clearly indicate that only jurisdictional defects in the proceedings below may be considered by this Court on appeal. *United States v. Winter*, 5 Cir., 1975, 509 F.2d 975, 978 n. 8; *United States v. Chaiken*, 5 Cir., 1973, 489 F.2d 1052; *United States v. Mizell*, 5 Cir., 1973, 488 F. 2d 97; *United States v. Drummond*, 5 Cir., 1974, 488 F. 2d 972; *United States v. Sepe*, 5 Cir., 1973, 486 F.2d 1044, aff'g, 474 F.2d 784.[5]

[2-11] Of the eleven defects alleged on appeal, those numbered 1, 2, 3, 4, 5, 6, 8, 10,[6] and 11 are nonjurisdictional. Consequently, these contentions may not be considered by this Court on appeal.

5 (cont'd)

In *United States v. Winter, supra* at 978 n. 8, we outlined the types of appealable issues following a *nolo contendere* or guilty plea. The jurisdictional defects mentioned included failure of the indictment to state a claim, the unconstitutionality of the statute underlying the indictment, the expiration of the statute of limitations, or the trial court's lack of jurisdiction over the subject matter or the persons of the defendants. Additionally, we explicitly disapproved the then current practice of District Courts accepting a plea conditioned on an agreement between the government and the defendant allowing for non-jurisdictional defects to be raised on appeal. *United States v. Sepe, supra.*

6 Furthermore, regarding the fines and sentence imposed, only in extreme circumstances, not present here, will a sentence imposed within the statutory maximum be disturbed on appeal. See *United States v. Menichino*, 5 Cir., 1974, 497 F.2d 935, 945. We find no such circumstances in this securities–mail fraud–obstruction of justice case.

Jurisdictional – Appealable

In one of their jurisdictional attacks, Tallant and Womack contend that § 17(a) of the Securities Act of 1933 (1933 Act), 15 U.S.C. § 77q(a),[7] is unconstitutional because it makes "unlawful future acts that 'would operate as a fraud' as distinguished from present or past acts that do not operate as a fraud." Essentially, because these purchasers received the same class of stock at the same

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[7] § 77q. Fraudulent Interstate Transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly–

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section.

price, the appellants' argument is that no purchaser sustained a loss by receipt of stock owned or controlled by Tallant or Womack rather than the original issue stock they believed they were purchasing.[8]

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[8] This "future act" argument is directed at the allegations in Count 1, paragraph 1 of the indictment and those counts which incorporate this provision by reference. In Count 1, paragraph 1(g), the indictment alleges the following.

"(g) Defendants caused said shares of PLC Class A common stock so acquired by said close corporations and by defendant TALLANT and said custodian from time to time to be sold to PLC investors at the then current offering price as *original issue stock of PLC* pursuant to the representation that the proceeds from the sales thereof would be used for specified corporate purposes of PLC when, as defendants at all said times well knew, said shares were not original issue stock of PLC and the proceeds from the sales thereof would not be used for any corporate purposes of PLC and the proceeds from the sales thereof would not be used for any corporate purposes of PLC, but instead, would be and were diverted to the use and benefit of defendants." (Emphasis added).

The prospectus for this stock issuance states ". . . shares of Class A Common Stock *of the Corporation* are offered by this Prospectus. . . ." (Emphasis supplied). The portion of the prospectus describing use of the proceeds from the sale of Class A common stock states that "Approximately 90% of these funds will be used in pursuing the primary objective of the Corporation in purchasing, developing and sale of real property and other necessary expenses appertaining thereto. The remaining 10% of such funds will be used as general working capital."

On the basis of this, a purchaser of stock could have expected to purchase stock the proceeds of which, at least in part, would be received by the corporate entity. However, when they received shares owned or controlled by Tallant or Womack, the proceeds from the sale of already issued stock did not go into the corporate treasury or any other corporate account.

[12-14] Section 77q(a) speaks in terms of that ". . . operates or would operate as a fraud or deceit upon the purchaser." Additionally, the 1933 Act makes unlawful the making of untrue statements of material fact or the omissions of such a fact. 15 U.S.C.A. § 77q(a). It is not the occurrence of a dollar loss as a result of the actions, statements, or omissions which is unlawful under the 1933 Act. Among the purposes of this Act, one was to insure purchasers of securities full, truthful, and accurate information on which to base their security transactions decisions and to protect them from fraud and misrepresentation. III L. Loss, Securities Regulation, 178 (2d ed. 1961). As a result, an unlawful act may[9] arise when the failure to convey information in accordance with this goal occurs. The nutshell essence of the violation in this case is that § 77q was violated when Preferred Land stock was offered for sale as ostensibly original issue stock and not for that it was, already issued shares in the hands of controlling interests.

In this case, when the purpose of unlawful acts under the 1933 Act are recognized, it is evident that the "unlawful future act" unconstitutional argument is invalid. The actions *already committed* by Mr. Tallant and Mr. Womack were and are unlawful under § 17q(a) of the 1933 Act.[10]

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9 "May" is used because other prerequisites must exist, e.g., use of an instrumentality of interstate commerce or the mail, before an act is unlawful under the 1933 Act.

10 The bluntest method of disposing of defendants' constitutional argument is to quote Professor Loss. "The question of constitutionality of the SEC statutes generally belongs to a bygone day." I L. Loss, Securities Regulation, 178 n. 1 (2d ed., 1961).

[15] The remaining jurisdictional issues are raised under No. 7, in note 4 above, which questions whether (a) the acts alleged in the indictment are within the criminal jurisdiction[11] of the federal courts, (b) an independent mail fraud offense is presented, (c) the indictment charges acts which constitute obstruction of justice, and (d) the indictment charges acts which constitute conspiracy. None of these items presents a valid jurisdictional error.

[16] Under 15 U.S.C.A. § 77v[12] jurisdiction of offenses

11 Part of the confusion in the oral argument before this Court and written argument in the briefs is the belief that the general fraud provision, § 17(a) of the 1933 Act, 15 U.S.C.A. § 77 q(a), is purely civil whereas the penalty provision under § 24 of the 1933 Act, 15 U.S.C.A. § 77x, is criminal. This view is myopic. The general fraud section, 77q(a), makes certain fraudulent acts unlawful. On the basis of such an unlawful act, both civil and criminal consequences may flow. An injunction, a noncriminal remedy, may be sought under the Securities Act § 20(b). Also, a criminal penalty may be imposed under § 77x. See *Crooker v. Securities and Exchange Commission*, 1 Cir., 1947, 161 F.2d 944, 947; *see generally* III L. Loss, Securities Regulation, 1421-30 (3d ed. 1961).

12 § 77v. Jurisdiction of offenses and suits

(a) The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant

(cont'd)

and violations of the 1933 Act is granted to the ". . . district courts of the United States, and the United States courts of any Territory . . . ." Thus if a violation of or offense under this Act exists, the District Court possessed subject matter jurisdiction.

It is the contention of Tallant and Womack that although they may have violated § 77q for injunctive actions or administrative action by the SEC, or possibly an implied liability action by a private shareholder, they have not committed acts and the indictment does not charge acts which allow imposition of criminal penalties under § 77x. We do not agree. By the sections of the 1933 Act directly relevant to this securities fraud case, § 77q sets forth "fraudulent interstate transactions", § 77c specifies "exempted securities" – those to which the 1933 Act does not apply, and § 77x spells out penalties for violation of the 1933 Act. Under § 77c(a)(11),[13] securities sold wholly within

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12 (cont'd)

or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

13 § 77c. Exempted securities

(a) Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:

* * * * *

(11) Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.

one state, intrastate securities, are exempted from the registration and other aspects of the 1933 Act. However, the *exemptions* of § 77c(a)(11) are specifically made inapplicable to § 77q, the fraudulent interstate transaction section, by subsection c which states "the exemptions provided in section 77c of this title shall not apply to the provisions of this section." 15 U.S.C.A. § 77q(c).

[17] Thus far, one facet of this statutory structure is evident. The fraudulent *intrastate* offer or sale of a security is made unlawful under § 77q if it utilizes ". . . any means or instruments of transportation or communication in interstate commerce or *by use of the mails,* . . . directly or indirectly." (Emphasis added). For Tallant and Womack, such unlawful acts were admitted by their respective *nolo contendere* pleas. See *Lott v. United States,* 1961, 367 U.S. 421, 426, 81 S. Ct. 1563, 6 L.Ed. 2d 940.[14] More simply, they admitted violation of a provision of the 1933 Act, the general antifraud provision.

14 The Supreme Court stated in *Lott, supra* at 426, 81 S.Ct. at 1567, that

"[A]lthough it is said that a plea of *nolo contendere* means literally 'I do not contest it,' *Piassick v. United States,* 5 Cir., 253 F.2d 658, 661, and 'is a mere statement of unwillingness to contest and no more,' *Mickler v. Fahs,* 5 Cir., 243 F.2d 515, 517, it does admit 'every essential element of the offense [that is] well pleaded in the charge.' *United States v. Lair,* 195 F. 47, 52 (C.A. 8th Cir.). Cf. *United States v. Frankfort Distilleries,* 324 U.S. 293, 296, 65 S.Ct. 661, 89 L.Ed. 951. Hence it is tantamount to 'an admission of guilt for the purposes of the case,' *Hudson v. United States,* 272 U.S. 451, 455, 47 S.Ct. 127, 71 L.Ed. 347, and 'nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record,' *United States v. Norris,* 281 U.S. 619, 623 50 S.Ct. 424, 425, 74 L.Ed. 1076."

[18] Tallant and Womack argue that although *intrastate securities* are not exempt from the general antifraud provision, the penalties imposed by § 77x still remain inapplicable to a wholly intrastate security because, unlike § 77q, § 77x does not explicitly state that the intrastate security exemption of § 77c(a)(11) is inapplicable to § 77x. Contrary to this argument, the very wording of § 77x *includes* within the perimeters to which it applies a violation of ". . . *any* of the provisions of [the 1933 Act) . . ." (Emphasis added). One of those provisions is § 77q(a) governing fraudulent interstate transactions. Consequently, Tallant and Womack violated a provision of the 1933 Act and were subject to imposition of the penalties under § 77x for that violation. III L. Loss Securities Regulation, 1442 n. 45, 1984 (2d ed. 1961).[15]

[19] From this it follows that if the acts charged in the indictment are sufficient to constitute an offense under the 1933 Act, a District Court possesses jurisdiction to impose criminal penalties under § 77x. Even a cursory examination of the first five counts of the indictment reveals, and we so hold, that the counts sufficiently allege acts which are offenses under the 1933 Act.

Defendants proffer as an additional deficiency in the indictment that it does not charge an offense which constitutes a violation of the mail fraud statute, 18 U.S.C.A. § 1341, standing alone. Counts 6 through 10 on their face state acts which violate § 1341.

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[15] Perhaps the most helpful analytical tool is to view the intrastate security exemption under § 77c(a)(11) as a *security* issuance exemption. It is not a fraudulent *transaction* (fraudulent offer or sale) exemption. Section 77q makes fraudulent *transactions* (the fraudulent offer or sale via instrumentalities of interstate commerce or the mails) illegal, not the security or its issuance.

[20] On examination of the acts alleged in the indictment and application of the applicable law, any doubt about the sufficiency of the mail fraud counts is dispelled. Section 1341 requires (a) a scheme to defraud, and (b) a mailing for the purpose of executing the scheme. *Pereira v. United States,* 1954, 347 U.S. 1, 8, 74 S.Ct. 358, 98 L.Ed. 435; *United States v. Brewer,* 4 Cir., 1975, 528 F.2d 492, 494. The mail fraud counts reallege the scheme to defraud charged under counts 1 through 5 of the indictment which set forth the 1933 Act violations.

Each of the mail fraud counts, 6 through 10, specifically alleges a mailing of stock certificates of Preferred Land Corporation to purchasers under the scheme. This is sufficient for showing acts which constitute the second element of mail fraud. The mailing allegation comes within the definition of mailing given in *Pereira, supra* at 8, 74 S.Ct. 358, that

> "To constitute a violation of these provisions, it is not necessary to show that petitioners actually mailed or transported anything themselves; it is sufficient if they cause it to be done.
>
> * * * * * *
>
> . . . There remains only one question whether Pereira 'caused' the mailing. That question is easily answered. Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." *Id.*, at 8-9, 74 S.Ct. at 363.

Each day in the general course of securities sales, certificates are mailed by brokers to purchasers and from sellers to brokers and payments from purchasers to brokers or sellers. Such use of the mails was not merely reasonably foreseeable by businessmen such as Tallant and Womack, it had to be known to them.

[21] Nor is the argument that the indictment alleges only an incidental use of mails not essential to the scheme to defraud under *United States v. Maze,* 1974, 414 U.S. 395, 94 S. Ct. 645, 38 L.Ed. 2d 603, and *Parr v. United States,* 1960, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277, of any avail. Unlike those instances when the mails were used after completion of the fraud and thus not affecting the success of the scheme, the use of the mails here was an integral part of the scheme – the mailing of the securities to the purchasers. As the recitation[16] from

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16 Since each of the mail fraud counts is substantially similar in wording, only count 6 is set forth below to indicate the sufficiency with which the mail fraud allegations were set forth in the indictment.

COUNT SIX

1. The Grand Jury realleges all of the allegations contained in subparagraphs (a), (b), (c), (d), (e), (f), (g) and (h) of paragraph numbered 1 and paragraphs numbered 2 and 3 of Count One of this indictment as constituting and describing a scheme and artifice devised and intended to be devised by defendants Fred C. Tallant, Sr. and William M. Womack, Jr., during the period from on or about May 18, 1967, to on or about the date of the filing of this indictment, to defraud and to obtain monies and properties by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be and were false when made, and said defendants wilfully and knowingly made use of the mails in the following manner:

(cont'd)

one of the mail fraud counts, count 6, shows, the indictment alleges use of the mails in completion of the fraud insuring its success. As such, the mails were used to execute the scheme to defraud within the scope of § 1341's application. *United States v. Sampson,* 1962, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136; *United States v. Melvin,* 5 Cir., 1977, 544 F.2d 767; *United States v. Green,* 5 Cir., 1974, 494 F.2d 820, 826.

[22] Another alleged constitutional deficiency in the indictment warrants brief comment. Tallant's and Womack's theory that one may not be charged with violation of both the mail fraud statute and § 77q(a) of the 1933 Act, is contrary to the existing case law. See *Edwards v. United States,* 1941, 312 U.S. 473, 61 S.Ct. 669, 85 L.Ed. 957; *United States v. Ashdown,* 5 Cir., 1975, 509 F.2d 793, *reh. denied,* 511 F.2d 1402; *Fisher v. Schilder,* 10 Cir., 1942, 131 F.2d 522; III L. Loss, Securities Regulation, 1430 (2d ed. 1961); see also *United States v. Melvin, supra.*

[23] Likewise, the argument that one may not be charged with violation of both the general interstate antifraud provision of the 1933 Act or the mail fraud statute and the conspiracy statute, 18 U.S.C.A. § 371, is incorrect.

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16 cont'd)

2. On or about the 2d day of June, 1969 in the Northern District of Georgia and within the jurisdiction of this Court, defendants for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter, a certificate for 2500 shares of Class A common stock of Preferred Land Corporation enclosed in an envelope addressed to Morris I. McDonald, Post Office Box 4941, Atlanta, Georgia 30307, to be sent and delivered by the Post Office Department of the United States; all in violation of Section 1341, Title 18, United States Code.

See *Pereira, supra* at 11-12, 74 S.Ct. 358; *United States v. Guterma,* 2 Cir., 1960, 281 F.2d 742, 745-46, *cert. denied,* 364 U.S. 871, 81 S.Ct. 114, 5 L.Ed.2d 93; *Holmes v. United States,* 8 Cir., 1943, 134 F.2d 125, 134.[17]

[24] The remaining supposed jurisdictional error relates to Womack's alleged violation of 18 U.S.C.A. § 1505, for obstruction of the SEC's enforcement of the 1933 Act. In setting forth the argument in Womack's brief that count 12 of the indictment ". . . gives no more facts or circumstances and no person could tell who, what, where, when, how, why or whom was involved", only this portion of count 12 is set forth.

> "corruptly influenced, obstructed and impeded and endeavored to influence, obstruct and impede the due and proper administration of the Securities Act of 1932 [1933] (15 U.S.C. 77 [77a et seq.]) under which a proceeding was

[17] The Supreme Court stated in *Pereira v. United States, supra,* at 11, 74 S.Ct. at 364 that "[i]t is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is not defense to a conviction for both. See *Pinkerton v. U.S.,* 328 U.S. 640, 643-644, 66 S.Ct. 1180, 1181-1182, 90 L.Ed. 1489, and cases cited therein. Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double je pardy."

For Tallant and Womack, the conspiracy requires proof of an agreement to commit an offense against the United States–an element not required for violation of the 1933 Act or the mail fraud statute. Similarly, examination of the elements necessary to violate the general anti-fraud provision of the 1933 Act and the mail fraud statute will reveal an element not common to both–the offer or sale of a security. Compare 15 U.S.C.A. § 77q with 18 U.S.C.A. § 1341; see *United States v. Bruce,* 5 Cir., 1974, 488 F.2d 1224, 1229-30.

> being had before the Securities and Exchange Commission."

We need not pause unduly in considering this contention. Our reading of the indictment reveals that count 12 in its entirety states sufficiently the charge against Womack.[18]

[25] Although an ineptly drafted indictment may sometimes rise to the jurisdictional level, a misread or paraphrased indictment which adequately sets forth the elements of the offense, fairly informs Womack of the charge against which he was to defend, and is sufficiently clear to allow him to plead an acquittal or conviction to bar future prosecutions for the same offense, does not constitute such a jurisdictional defect. See generally, *United States v. Koehler,* 5 Cir., 1977, 544 F.2d 1326.

For the foregoing reasons, we hold (i) the challenge to the constitutionality of the Securities Abt of 1933 to be without merit, (ii) the indictment adequately charges offenses within the jurisdiction of the federal courts for violation of the anti-fraud provision of the Securities Act of 1933, the federal mail fraud statute, the federal obstruction of justice, and the federal conspiracy statute.

AFFIRMED.

[18]

COUNT TWELVE

In or about July, 1970, and continuing to on or about the date of the filing of his indictment, defendant WILLIAM M. WOMACK, JR. corruptly influenced, obstructed and impeded and endeavored to influence, obstruct and impede the due and proper administration of the Securities Act of 1933 (15 U.S.C. § 77 [77a et seq.]) under which a proceeding was being had before the Securities and Exchange Commission, an agency of the United States, in that defendant WOMACK caused certain stockholder ledger records of Preferred Land Corporation to be falsified and presented them to Securities and Exchange Commission investigators for examination, in violation of Section 1505, Title 18, U.S. Code.

No. 76-1768

In the Supreme Court of the United States

OCTOBER TERM, 1977

FRED C. TALLANT, SR., AND WILLIAM M. WOMACK, JR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 547 F. 2d 1291. The opinions of the district court are reported at 407 F. Supp. 878 and 407 F. Supp. 896.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1977. The petition for a writ of certiorari was filed on June 3, 1977, and therefore is substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on appeal from a conviction following a voluntary, intelligent and unconditional plea of *nolo contendere*, the court of appeals properly refused to consider alleged errors in the procedures employed in returning the indictment.

STATEMENT

1. An indictment filed on April 17, 1974, in the United States District Court for the Northern District of Georgia charged petitioners, officers and directors of the Preferred Land Corporation, with making fraudulent representations in connection with the intrastate offering and sale of the corporation's securities, in violation of 15 U.S.C. 77q(a) (counts 1-5), mail fraud, in violation of 18 U.S.C. 1341 (counts 6-10), and conspiracy to commit those offenses, in violation of 18 U.S.C. 371 (count 11). In addition, petitioner Womack was charged with falsifying business records submitted to the Securities and Exchange Commission, in violation of 18 U.S.C. 1505 (count 12) (Pet. App. 2a).

Following the district court's denial of their motion to dismiss the indictment (407 F. Supp. 878),[1] petitioners agreed to plead *nolo contendere* on condition that they be allowed to withdraw their pleas if they were dissatisfied with the sentence imposed. The court refused to accept these conditional pleas (407 F. Supp. 896, 898).[2] The next day, immediately before trial was scheduled to begin, petitioners tendered unconditional pleas of *nolo contendere* to

[1]As noted by the court of appeals, petitioners also made a number of unsuccessful collateral attacks upon the validity of their prosecution (Pet. App. 2a-3a, n. 2).

[2]The background of petitioners' *nolo contendere* pleas is set forth in the district court's opinion denying their motion for bail pending appeal (407 F.Supp. 896).

all counts of the indictment.[3] After considerable and detailed discussions with counsel for petitioners and the government, the court accepted the pleas (*ibid.*).

At the sentencing proceeding, petitioners expressed their full awareness of the effects of a plea of *nolo contendere* (Tr. 32, 54). Petitioner Tallant was sentenced to three years' imprisonment, all but three months of which was suspended in favor of five years' probation, and was fined a total of $40,000. Petitioner Womack was sentenced to three years' imprisonment, all but two months of which was suspended in favor or five years' probation, and was fined a total of $15,000 (Pet. 3).

2. On appeal from their convictions, petitioners conceded that their *nolo contendere* pleas were knowledgeable and intelligent (Br. 21), but they nonetheless asserted as error the claims previously denied by the district court in their motion to dismiss the indictment. The court of appeals affirmed (Pet. App. 1a-17a). It found that the bulk of petitioners' contentions involved "nonjurisdictional" defects that could not be raised on appeal from a conviction based upon a plea of *nolo contendere* (*id.* at 3a-5a) and that the remainder of petitioners' claims were insubstantial (*id.* at 6a-17a).[4]

[3]Petitioner Tallant's plea covered counts 1 through 11, while petitioner Womack's plea covered counts 1 through 12 (Pet. App. 3a, n. 3).

[4]The court refused to consider the following questions (Pet. App. 3a-5a and n. 4):

> 1. Whether the grand jury returning the indictment was randomly selected from a fair cross section of the community.
>
> 2. Whether the indictment should have been dismissed because one of the grand jurors was disqualified as a convicted felon.
>
> 3. Whether the trial court properly refused to permit appellants to inspect the grand jury minutes to determine

ARGUMENT

Petitioners' sole contention is that the court of appeals erred in refusing to pass upon the merits of each of their

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whether that body was prejudiced by pre-indictment publicity causing a denial of due process.

4. Whether the District Court properly refused to grant appellants permission to inspect grand jury minutes to determine whether the United States Attorney substituted his judgment for that of the grand jury causing a denial of due process.

5. Whether the District Court should have dismissed the indictment on grounds of prejudicial pre-indictment publicity.

6. Whether the indictment was invalid because inherently prejudicial by reason of misjoinder of parties and offenses.

7. Whether the United States Attorney abused his discretion by procuring the indictment on the basis of the grand jury's misunderstanding of the law.

8. Whether the indictment was unauthorized by the United States Attorney General and obtained in violation of Section 20 of the Securities Act of 1933.

However, the court did consider petitioners' other claims of error, which the court held had survived their pleas of *nolo contendere*. These issues included:

1. Whether the indictment charged offenses within the criminal jurisdiction of the federal courts.

2. Whether Section 17 of the Securities Act of 1933 (15 U.S.C. 77(q)(a)) is constitutional.

3. Whether the prosecution was untimely under the statute of limitations.

The court of appeals determined that each of these allegations was without merit (*id.* at 4a, n. 4, 6a-17a), a conclusion petitioners have not contested in this Court. In addition, although the court below concluded that petitioners' contention that the district court incorrectly imposed fines or penalties was not reviewable (*id.* at 4a, n. 4), the court did consider, and properly rejected, this claim (*id.* at 5a, n. 6).

arguments. The court correctly concluded, however, that several of petitioners' points on appeal had been waived by their voluntary and intelligent pleas of *nolo contendere*, which "remove[d] the issue of factual guilt from the case" (*Menna* v. *New York*, 423 U.S. 61, 62, n. 2) and precluded appellate consideration of claimed violations of rights that preceded the plea and involved neither the jurisdiction of the district court nor the power of the government to prosecute. See *United States* v. *Michigan Carton Co.*, 552 F. 2d 198, 201 (C.A. 7). The claims that the court of appeals refused to consider challenged only the procedures employed in returning the indictment and did not call into question the validity of the charges, the power of the government to institute them, or the authority of the district court to render judgment and impose punishment. Compare *Menna* v. *New York*, *supra*, 423 U.S. at 62-63 and n. 2. Accordingly, as a result of the entry of valid *nolo contendere* pleas, petitioners would not have been entitled to a reversal of their convictions even if their numerous allegations of legal error in the obtaining of the indictment were correct.

Once petitioners chose to bypass the orderly procedure for litigating their claims in order to obtain the benefits of an unconditional plea of *nolo contendere*, the government acquired a legitimate expectation of finality in the resulting convictions. See *Lefkowitz* v. *Newsome*, 420 U.S. 283, 289. Petitioners' *nolo contendere* pleas, just like pleas of guilty, therefore represented "a break in the chain of events which * * * preceded [them] in the criminal process." *Tollett* v. *Henderson*, 411 U.S. 258, 267. Moreover, like pleas of guilty, the pleas of *nolo contendere* were a complete admission of guilt. As this Court stated in *Lott* v. *United States*, 367 U.S. 421, 426:[5]

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[5]In considering the timeliness, under the Federal Rules of Criminal Procedure, of the defendants' motions in arrest of judgment and, hence, the timeliness of their appeals, the Court concluded in *Lott* that "it was

> Although it is said that a plea of *nolo contendere* means literally "I do not contest it," * * * and "is a mere statement of unwillingness to contest and no more," * * * it does admit "every essential element of the offense [that is] well pleaded in the charge." * * * Hence, it is tantamount to "an admission of guilt for the purposes of the case," * * * and "nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record," * * *.

Hence, "[f]or purposes of the criminal case in which the plea is entered, a conviction on a *nolo* plea is equivalent to a conviction on a plea of guilty." 8 Moore's *Federal Practice*, para. 11.07, p. 11-112 (2d ed. 1976). See *United States* v. *Kondos*, 509 F. 2d 1147, 1148 (C.A. 7); *McGrath* v. *United States*, 402 F. 2d 466, 467 (C.A. 7). See generally *United States* v. *Mizell*, 488 F. 2d 97, 99-100 (C.A. 5). In sum, the court of appeals properly determined that petitioners' challenge to the procedures underlying their indictment did not survive their pleas of *nolo contendere*.

While the circuits are in general agreement concerning the extremely narrow scope of review on appeal after pleas

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the judgment of conviction and sentence, not the tender and acceptance of the pleas of *nolo contendere*, that constituted the 'determination of guilt' within the meaning of Rule 34 [Fed. R. Crim. P.]." 367 U.S. at 426. Petitioners have misread *Lott* in asserting that the court of appeals "proceeded upon a wrong view of the law in treating the appeal as [one] 'from a conviction founded on a *nolo contenaere* plea'" (Pet. 4-5). Here, as in *Lott*, petitioners were "convicted," and their guilt conclusively determined, when the district court entered judgment and imposed sentence following their pleas of *nolo contendere*. "Conviction" of course occurs when judgment is entered, not when the plea—whether guilty or *nolo contendere*—is accepted. See. Fed. R. Crim. P. 32(b)(1).

of guilty or *nolo contendere*, certain courts of appeals have chosen in some cases to review particular legal questions despite the entry of such pleas. See Pet. 6-7; *United States* v. *Mizell*, *supra*. Since each of these cases was decided prior to this Court's decisions in *Tollett* and *Menna*, which clarified the relatively narrow scope of review after a plea of guilty or *nolo contendere*, it is unlikely that any conflict among the circuits continues to exist. However, to the extent that this variation in past practice suggests a continuing conflict, this case is an inappropriate vehicle in which to resolve it.

None of the issues that the court of appeals refused to consider in this case—which esentially related to the procedures by which the indictment was obtained—would have been held reviewable in the other circuits. Thus, petitioners did not contend that their pleas were involuntary (*Doran* v. *Wilson*, 369 F. 2d 505 (C.A. 9); *Briley* v. *Wilson*, 376 F. 2d 802 (C.A. 9)) or that the government was foreclosed from bringing charges against them (*Menna* v. *New York*, *supra*). Nor does this case present an "exceptional situation" as was present in *Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 412, where, subsequent to the defendants' pleas of *nolo contendere*, the Court resolved a statutory uncertainty that was central to the issue of criminal liability. Finally, as noted earlier (see note 4, *supra*), the court of appeals specifically considered petitioners' claim that the prosecution was barred by the statute of limitations, and thus the decision below is entirely consistent with *Jaben* v. *United States*, 333 F. 2d 535 (C.A. 8), affirmed, 381 U.S. 214.[6]

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[6]The remaining cases cited by petitioners are equally unavailing. In view of the district court's rejection of petitioners' conditional pleas of *nolo contendere* and their subsequent tender of unconditional *nolo* pleas, it is clear that no agreement was made to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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preserve certain issues for appeal. Compare *United States* v. *Cook*, 463 F. 2d 123, 125 (C.A. 5); *United States* v. *Rosenberg*, 458 F. 2d 1183, 1184 (C.A. 5), certiorari denied, 409 U.S. 868; *United States* v. *Mann*, 451 F. 2d 346, 347 (C.A. 2); *United States* v. *Grassia*, 354 F. 2d 27, 29 (C.A. 2), vacated and remanded on other grounds, 390 U.S. 202; *United States* v. *Doyle*, 348 F. 2d 715 (C.A. 2), certiorari denied, 382 U.S. 843. Moreover, there is not applicable here any statute expressly authorizing review of certain issues on appeal following convictions based on pleas of guilty or *nolo contendere*. See *Lefkowitz* v. *Newsome*, *supra*; *United States ex rel. Rogers* v. *Warden of Attica State Prison*, 381 F. 2d 209 (C.A. 2). Nor is this a case in which the defendant was adjudged guilty on stipulated facts; this Court has indicated that in such circumstances (which do not include a formal admission of guilt) the defendant may present on appeal any issue that he would have been entitled to raise after trial. *Lefkowitz* v. *Newsome*, *supra*, 420 U.S. at 290-291, n. 7. See also *United States* v. *Wysocki*, 457 F. 2d 1155, 1158 (C.A. 5), certiorari denied, 409 U.S. 859. Finally, unlike *United States* v. *De Costa*, 435 F. 2d 630, 632 (C.A. 1), in which the court of appeals pretermitted decision of the appealability issue by finding that the defendant's claims were insubstantial, petitioners have not claimed that their prosecution was barred by the Speedy Trial Clause of the Sixth Amendment.